



INDEPENDENT CONTRACTORS

Individuals who are “independent contractors” are not considered employees for wage and hour purposes. The state agencies most involved with the determination of the independent contractor status are the Employment Development Department (EDD), which is concerned with employment-related taxes, and the Division of Labor Standards Enforcement (DLSE), which is concerned with whether the wage, hour and workers’ compensation insurance laws apply. There are other agencies, such as the Franchise Tax Board (FTB) and the Contractors State Licensing Board (CSLB), which also have regulations or requirements concerning independent contractors. Since different laws are involved, it is possible that the same individual will be considered an employee for purposes of one law and an independent contractor under another law. Because the potential liabilities and penalties are significant if an individual is treated as an independent contractor and later found to be an employee, it is advisable that each such relationship be thoroughly researched before being implemented.

There is no single definitive factor in determining whether an individual is an independent contractor or an employee for purposes of wage and hour laws. An individual will be considered an employee where the employer exercises all necessary control by direct or indirect means over the work details of the individual. (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989 48 Cal.3d 341)). In addition, the following factors are to be considered in determining an individual’s status as an independent contractor:

1. The individual performs services in an occupation or business distinct from that of the principal;
2. The work performed is not part of the regular business of the principal;
3. The individual supplies his/her own instrumentalities, tools and the work place;
4. The individual has made a significant investment in the equipment or materials required for his or her task(s);
5. The individual's services require a unique skill in a particular occupation;
6. The individual's occupation in the locality is usually done by a specialist without supervision;
7. The individual’s opportunity for profit or loss depends on his/her own managerial skill;
8. The time for which the services are to be performed is reasonably limited to the task(s) for which the individual was hired;
9. The working relationship between the individual and the employer is reflective of the time allotted to perform the task(s) for which the individual was hired;
10. The method of payment is time certain or project specific;
11. The parties do not believe they are creating an employer-employee relationship. (*Borello, Id.* at 350)

12. The individual has the right to control and discretion as to the manner of performance of the contract for services but not the means by which the work is accomplished; (Labor Code Section 2750.5)
13. The individual is customarily engaged in an independently established business; (Labor Code Section 2750.5)
14. The individual's independent contractor status is bona fide and not a subterfuge to avoid employee status; (Labor Code Section 2750.5)
15. The individual has a substantial investment in the business other than personal services; (Labor Code Section 2750.5)
16. The individual holds him/herself out to be in business for him/herself; (Labor Code Section 2750.5)
17. The individual bargains for a contract to complete a specific project for compensation by project rather than by time; (Labor Code Section 2750.5)
18. The individual has control over the time and place the work is performed; (Labor Code Section 2750.5)
19. The individual hires his/her own employees; (Labor Code Section 2750.5)
20. The individual holds a license to perform the work; (Labor Code Section 2750.5)
21. The relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract. (Labor Code Section 2750.5)

Even where there is an absence of control over the details, an employer-employee relationship will be found if the principal retains pervasive control over the operation of the whole, the worker's duties are an integral part of the operation, and the nature of the work makes detailed control unnecessary. (*Yellow Cab Cooperative v. Workers Compensation Appeals Board* (1991) 226 Cal.App.3d 1288) In addition, the existence of a written agreement purporting to establish an independent contractor relationship is not determinative. (*Borello, Id.* at 349) Nor is the fact that a worker is issued a 1099 form rather than a W-2 form determinative with respect to independent contractor status. (*Toyota Motor Sales v. Superior Court* (1990) 220 Cal.App.3d 864, 877)

There is a rebuttable presumption that where a worker performs services that require a license pursuant to Business and Professions Code § 7000, *et seq.*, or who performs services for a person who is required to obtain such a license, the worker is an employee and not an independent contractor (Labor Code § 2750.5)